IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.6/2000

State (through P.P.) .... Appellant.

V/s.

1) Satish Narayan Sawant,
2) Mohan Narayan Sawant,
3) Smt. Yeshoda Narayan Sawant,

All resident of Banastari, Goa. .... Respondents/ Accused.

Mr.V.P. Thali, Addl. Advocate General with Ms. S. Linhares, Addl. Govt. Advocate for the State.

Mr. S.D. Lotlikar, Sr. Advocate with Mr. A.D. Bhobe, Advocate for the respondents/accused.

CORAM : V.C. DAGA &
P.V. HARDAS, JJ.

DATE OF RESERVING THE JUDGMENT : JUNE 11, 2002.

DATE OF PRONOUNCING THE JUDGMENT: JULY 1, 2002.

J U D G M E N T : (Per HARDAS, J).

The State being aggrieved by the acquittal of respondents No.1, 2 and 3 for the offences punishable under Sections 302, 323, 143, 147 and 149 of the Indian Penal Code, by the Addl. Sessions Judge, Panaji by Judgment dated 4.8.1998 in Sessions Case No.55/1988, has filed the present appeal challenging the acquittal of the said respondents. On 19.4.1988, Pw.21, who was attached to the Ponda Police Station as P.S.I., received a phone call at about 22.45 hours from P.S.I. K.K. Dessai of

the Panaji Police Station that person named Rauji Dulba Sawant had been brought in a police jeep by police constable Jaisingrao Rane and while he was being taken to the Goa Medical College, he expired. On receiving this message, Pw.21, P.S.I. Joaquim Dias along with A.S.I. Tabit Mamlekar, went to the scene of offence. Pw.21, PSI Joaquim Dias, reached the scene of offence at 11.30 p.m. and with the help of torch light, surveyed the scene of offence. He deputed constables on the front and rear doors and gave a call to the inmates of the house. But no one responded to the said call. In front of the house, he noticed some blood stains in the courtyard and noticed a pipe of length of about 1 foot or slightly less lying in the courtyard. The said pipe had blood stains. Pw.21, PSI Dias gave instructions to his subordinates not to allow anyone to disturb or touch the articles. He also noticed that there were blood stains on the wall in the verandah, as well as blood stains on the floor. He noticed a brass chain lying on the floor in the verandah. After some time, Dy. S.P. Shri Raikar and P.I. Shri Alan D'Sa reached the spot at about 1.30 a.m. Thereafter, Pw.21, along with P.I. D'Sa gave a call to the inmates of the house to open the door and on hearing their call, one lady opened the door. On entering, Pw.21, PSI, J. Dias found a lock of hair lying on the ground and he also noticed a brass lamp. The flooring of the room was of cowdung and he found floor to be in a disturbed state. He noticed that on the dinning table

there were two plates, containing some rice and the rice had been partly eaten. A pair of shoes was found on the dining table and a kerosene lamp was burning on the dining table. In the kitchen, Pw.21 noticed that rice had fallen and spread on the floor. Electric fuses were removed and were kept on the window sill. Pw.21 inquired with the lady who had opened the door and learnt that her name was 'Yeshoda' (respondent No.3). He also found that there were two girls by name Sarita and Sharmila in the house. In the meantime, Pw.2 Ashok and Pw.1, Baby who are the brother and sister of the deceased and Pw.8, Kunda who is widow of the deceased, returned to the house. He made some inquiries with the said persons and brought them along with Yeshoda and her two daughters, namely Sarita and Sharmila to the Police Station. Respondents No.1 and 2 were not found in the house and, therefore, Dy. S.P. Shri Raikar and P.I. Shri Alan D'Sa went in search of respondents No.1 and 2. Pw.12, ASI Tabit Mamlekar along with some police constables were asked to stay at the scene of offence. Pw.18, Laxmi and Pw.2, Ashok were allowed to remain inside the house. At the police station, a complaint at Exhibit Pw.1/A of Pw.1, Baby was recorded. On the basis of the said complaint, offences against the respondents and two juvenile offenders, namely Sarita and Sharmila were registered. Yeshoda, respondent No.3 and Sarita and Sharmila were arrested. Clothes of Sarita and Sharmila came to be attached.

2. On the next day, Pw.21, PSI, J. Dias recorded the scene of offence panchanama vide Exhibit Pw.3/A at about 9.30 a.m. in the presence of Pw.3, Dilip G. Gaunkar and one Deu Ramdu Kavlekar. Lock of human hair, broken brass lamp, chain of brass lamp, blood stained earth, black thread, a green colour iron pipe, were attached. The scene of offence panchanama concluded at about 10.30 a.m. Thereafter, Pw.21, PSI, Dias proceeded to the Goa Medical College were the post mortem on the dead body of the deceased Rauji was to be conducted. Pw.7, Dr. Purnanand Audi performed the post mortem on the dead body of the deceased. Pw.7, Dr. Audi noticed 16 injuries on the person of the deceased. Out of the 16 injuries, injury No.1 which was an incised penetrating stab wound of 4 x 1 cm. with depth of 12 cms. situated on the lower back of the chest on the right side on 11th inter-costal space was found to have penetrated through the right inter-costal space and penetrated through and through and the diaphragm on the right dome had cut and had entered into the abdominal cavity and had cut the liver. The other injuries which included two other incised wounds, one on the head and multiple bruises and abrasions were found to be superficial injuries. According to Pw.7, Dr.Audi, the death was due to haemorrhage and shock as a result of stab injury. Pw.7, Dr. Audi opined that the injury No.1 was sufficient to cause death in ordinary course of nature. The post-mortem report is at Exhibit Pw.7/A.

Pw.7 had also sent the blood of the deceased for groping and the blood group of the deceased was determined as A (Positive) vide Exhibit Pw.7/B. The report of the Chemical Analyser in respect of the examination of viscera of the deceased is at Exhibit Pw.7/C.

3. Pw.21, PSI, J. Dias had drawn the inquest panchanama in the presence of Pw.9, Manohar Chopdekar and one Naguesh Y. Lad and the inquest panchanama is at exhibit Pw.9/A. The underwear of the deceased which was stained with blood, came to be attached vide panchanama Exhibit Pw.6/B in the presence of Pw.6, Tulsidas T. Gaonkar and Gajanan Hari Kundaikar. At the instance of the juvenile accused Sharmila, the knife, article 8 came to be attached by disclosure panchanama under Section 27 of the Evidence Act vide Exhibit Pw.6/A in the presence of Pw.6, Tulsidas Gaonkar and Gajanan Kundaikar. The saree which was worn by respondent No.3, Yeshoda also came to be attached under a panchanama at the instance of the juvenile offender Sharmila. Similarly, the bush-shirt of respondent No.1 Satish also came to be attached at the instance of juvenile offender Sharmila.

4.On 21.4.1988, Pw.18, Laxmi, mother of the deceased produced a 11 inches long cement block like trunk of an elephant. The same was attached by Pw. 21 PSI, J. Dias vide Exhibit Pw.5/A in the presence of Gopinath Gawde and Anant Bhikaro Naik. On 22.4.1988,

statements of Pw.2, and Ashok Dulba Sawant, Pw.4, Eknath Naik were recorded. On 23.4.1988, statement of Parmeshwar L. Naik, and Pw.8, Kunda were recorded. On 28.4.1988, as the accused No.1, Satish and Accused No.2 Mohan had surrendered before Panaji Police, they were taken into custody.

5. The arrest panchanama of accused Nos.1 and 2 is at Exhibit Pw.10/A and was executed in the presence of Pw.10, Yeshwant G. Sawant and one Santosh N. Prabhu. Since the accused No.1 was found having an injury, he was referred for medical examination and was examined by Pw.14, Dr. B.N. Rana, who found the following injuries : (1) A wound of 1 inch x 3/4th inch, oval shape on left side of the back, covered with black scalp; (2) A wound of 1 inch x half an inch, oval in shape in the midline on back. The wound was almost healed which was covered with black scalp. Pw.14 found that the injuries were about 9 to 10 days old. The medical certificate of examination of respondents No.1 and 2 is at exhibit Pw.14/A. The blood groups of respondents No.1 and 2 were determined as A Positive and AB Positive, respectively, by Pw.16, Dr. Aleixo Martins vide Certificates at Exhibit Pw.16/A (colly). Pw.17, Ms. Nalini Madkaikar examined the blood of Yeshoda, respondent No.3 and determined her blood group to be B Negative vide Exhibit Pw.17/A. Meanwhile, Yeshoda, respondent No.3 was examined by Pw.15, Dr. Rajnand Dessai. She was found to have no external

injuries and the certificate of her examination is at Exhibit Pw.15/A. The sample of the scalp heir of the respondents was obtained and sent to the Forensic Science Laboratory.

6. Pw.21, P.S.I. J. Dias after completing the investigation filed the charge sheet against the present respondents on 3.2.1989. He had filed the charge sheet against two juvenile offenders, namely Sarita and Sharmila before the Juvenile Court in the month of February, 1989. Incidently, it may be stated here that from the facts emerging from the prosecution case, the two juvenile offenders, Sarita and Sharmila were acquitted of the offences with which they were charged.

7. The learned Addl. Sessions Judge to whom the case was committed, vide Exhibit 4, framed the charge against the present respondents for the offences punishable under Sections 302, 323, 143, 147 and 149 of the IPC. Respondents No.1, 2 and 3 claimed to be tried by denying their guilt. The prosecution, in support of its case, examined in all 21 witnesses which included Pw.1, Baby, Pw.2, Ashok, Pw.8, Kunda, Pw.18, Laxmi and Pw.4, Eknath as eye witnesses. The respondents in their statements under Section 313 Cr.P.C. have taken the following defence :

> "On 19.4.88 Raoji came home at about 6.30 p.m. and within 5 minutes left the house. At about

8.30 p.m. Raoji came back and he was drunk. At this time, I was serving food to my sons namely A-1 and A-2. He removed his clothes and went to take bath in the underwear itself. He came inside the house after taking bath and while entering the house he put off the light. I uttered the following "Bebdea light paloili moren" and so saying I told my son that I will bring kerosene lamp and I was going to bring kerosene lamp. At this time Raoji caught hold of my hair. I was holding rice pot on which Raoji gave a kick as a result of which the rice pot fell on the floor and the cooked rice fell on the floor. My son Satish (A1) caught hold of Raoji. At this time Raoji pushed Satish. thereafter, he pulled Laman dio (hanging Oil Lamp) which was hanging and gave a blow with the said laman dio on the back of A-2 Mohan. Someone removed the fuse of the light and there was darkness in the house. My son Satish and Raoji fell on the floor. The members of the group of Raoji came on the spot. They dragged Raoji to the courtyard. One of the members of the group of Raoji stabbed Raoji thinking that they were stabbing Satish. One of the members of the group of Raoji stabbed Raoji thinking that they were stabbing Satish"

8. The learned Addl. Sessions Judge, before whom the offences were tried, by Judgment dated 4.8.1998 acquitted the respondents on the ground principally that by virtue of the various contradictions and omissions, the version of the eye witnesses lost all its credibility.

9. During the trial, reliance was placed by the prosecution on the report of the Forensic Science Laboratory, which is at Exhibit Pw.21/A. Perusal of the said report shows that the blood stained earth, brass chain, iron pipe, underwear of the deceased, knife, article 8, saree worn by respondent No.3, Yeshoda, bush-shirt of respondent No.1, Satish and the frocks of the juvenile offenders, Sarita and Sharmila were stained with human blood. Out of them, the underwear of the deceased, the saree worn by respondent No.3, bush-shirt of respondent No.1 and one of the frocks, was stained with blood of A group. The knife article 8 was found to have stained with blood on the blade and handle.

10. The prosecution evidence begins with the examination of Pw.1, Baby, sister of the deceased Raoji. Respondents No.1 and 2 Satish and Mohan are the sons of one Narayan, brother of Baby and of the deceased. Juvenile offenders, Sarita and Sharmila are the sisters of respondents No.1 and 2. Respondent No.3, Yeshoda is the wife of said Narayan and mother of respondent No.1

Satish and respondent No.2, Mohan. From the evidence of the prosecution witnesses, it emerges that the deceased Raoji and his brother Narayan were residing in one house, in Banastari. They used to share a common kitchen between them. Pw.1, Baby was residing in the same house with her brother, deceased Raoji. Pw.18, Laxmi, mother of the deceased, Pw.1 Baby and of said Narayan were also residing with the deceased, Raoji. The deceased Raoji was working as Driver in the firm "Mandovi Plastics". Two or three days before the Ganesh Festival, Raoji had informed Narayan that Raoji would install statue of Lord Ganesh in the house and accordingly, had purchased the same. Religious ceremony was performed by installing the statue of Lord Ganesh in the house. While it was being performed, respondent No.2, Mohan started uttering insults while standing in the kitchen. Raoji had invited respondent No.1, Satish to sit along with Rauji when the priest was performing the religious ceremony. Respondent No.3, Yeshoda told Satish, respondent No.1 not to do anything in the ceremony and insulted the family members of Raoji. There was some bickering on the next day when statue of Lord Ganesh was being immersed. The bickering was between respondent No.1, Satish and deceased Raoji. On the next day, Raoji is alleged to have complained to Narayan regarding bickering of Satish and from that day i.e. from 30.8.1987, the two families began to cook separately though in the same kitchen. It also appears from the prosecution witnesses that the relation between

the family members of Narayan and the family members of Raoji were strained on account of sharing of the electricity and water bills.

11. On 19.4.1988, the deceased Raoji returned from his duty at about 6.30 p.m. and thereafter, went to purchase some articles. On his return, he went to have his bath. After having his bath, he went and switched off the light in the room. As soon as the deceased switched off the light, respondent No.1, Satish came from the room and started abusing Raoji. There was a heated exchange of words in between Raoji and Satish and Satish switched on the light, which was again switched off by Raoji. Thereupon Satish, respondent No.1 went and removed the fuse of the said light. Respondent No.3, Yeshoda had then lit a kerosene lamp and had brought the same in the hall. In the hall there was already an oil lamp burning, which was attached to the ceiling by a brass chain. Meanwhile, respondent No.3, Yeshoda, started abusing Pw.8, Kunda, Pw.18, Laxmi, Pw.1, Baby and the deceased Raoji. Thereafter, the three respondents and the two juvenile offenders all gathered in the hall to assault Raoji, Pw.1, Baby and Pw.8, Kunda. According to Pw.1, Baby, in order to avoid the assault by all of them, they went to "bulcao" (balcony). According to Pw.1, Baby when they had gone to ‘bulcao’, respondent No.1, Satish went to his room and came to ‘bulcao’ with a knife and hit several blows with the knife on Raoji’s

back portion of his chest. Pw.1, Baby corrected herself by saying that Satish went to his mother's room and brought the knife and assaulted Raoji. After Raoji received stab injuries by knife, Raoji fell down saying to Pw.1, Baby that he was dying. According to Pw.1, Baby, at that time respondent No.1, Satish and all other respondents were in the 'bulcao'. After the deceased, Raoji fell down on the ground, according to Pw.1, Baby, Yeshoda, respondent No.3 kicked Raoji. She had also squeezed the private part of the deceased. At that time, respondent No.1, Satish who was holding knife in his hand, handed over the same to respondent No.3, and respondent No.3 then assaulted Kunda with the said knife, but Pw.8, Kunda caught the knife in her hand, which caused injury to her right palm. Thereafter, according to Pw.1, Baby, respondent No.3, Yeshoda handed back the knife to respondent No.1, Satish and respondent No.2, Mohan brought the oil lamp which was hung in the room by a brass chain and hit the oil lamp on the head of Raoji. When Pw.8, Kunda tried to intervene, the other three respondents started assaulting her with fists and slaps. Pw.2, Ashok, according to Pw.1, Baby came there and questioned the respondents as to what they were doing. Respondents No.1 and 2 then started assaulting Ashok also. According to Pw.1, Baby, respondent No.3, Yeshoda, told respondent No.1 Satish and respondent No.2, Mohan not to assault Ashok, but to finish of Raoji. Pw.8, Kunda, Pw.18, Laxmi and Pw.1, Baby then lifted Raoji and

brought him to the courtyard. In the meanwhile residents of the locality had gathered in the courtyard and had told the respondents not to assault Raoji. According to Pw.1, Baby, respondent No.1, Satish had told the persons that they have already committed murder of one person and in case anyone interfered, they would murder two more persons, meaning thereby Pw.8, Kunda and Pw.1, Baby. The juvenile offender, Sarita went inside the house and brought out one iron pipe which she handed over to respondent No.1, Satish. Respondent No.1 then hit the said pipe on the right leg of Pw.1, Baby and also gave a blow with the said pipe on Raoji's right hand. Juvenile offender, Sharmila brought a cement block shaped like an elephant trunk, which she handed over to respondent No.3, Yeshoda. Yeshoda, then started assaulting Raoji with the said cement block. Pw.1, Baby removed the said piece of cement block from Yeshoda's hand and Yeshoda, respondent No.3 picked up one stone in order to throw it on Raoji by saying that she was going to kill him with that stone. However, Pw.1, Baby intervened and removed the stone from Yeshowda's hand. Pw.18, Laxmi rushed to the rescue of deceased Raoji. The respondents as well as Sarita and Sharmila started assaulting her and Pw.8, Kunda with slaps. Respondent No.1, Satish was brandishing the knife before the people who had gathered. In the meantime, police jeep arrived at the scene and on seeing the police jeep, all the accused ran away from the courtyard and went inside. Pw.1, Baby and others asked the police to

take Raoji to the Hospital. Raoji was taken in the police jeep to the hospital along with Pw.1, Baby, Pw.2, Ashok, and Pw.8, Kunda. Pw.1, Baby returned to the police station, where she lodged her complaint which is at Exhibit Pw.1/A. On the basis of this complaint, offences came to be registered and the accused came to be arrested.

12. Pw.1, Baby in her evidence states that 8 days prior to the incident, Narayan, the father of respondents No.1 and 2 was heard talking loudly to respondent No.3 that on 19th April, he would be going to Ghataprabha and the accused should do what they like. Narayan had left for Ghatprabha on 19th April, at about 12.00 to 12.30 noon. However, he returned on 20th April. Pw.1, Baby has identified knife article 8, iron pipe, article 6, the oil lamp, article 5, the brass chain, article 4, saree of Yeshoda, article 9, the bush-shirt of respondent No.1, article 10 and the frocks worn by Sarita and Sharmila.

13. In the cross examination, Pw.1, Baby states that on 19th April, 1988, after leaving the house at 6.30 p.m. for going to the grocery shop, Raoji returned home within about 5 minutes. She further states that as soon as he took his bath, after returning, he came into the hall. This witness states that she is unable to tell how much time Raoji took to take bath. She states that it

was about quarter to seven when Raoji put off the light on coming after taking the bath that evening. She admits that when Raoji put off the light, Satish was in the room of his mother. Pw.1 was questioned regarding the sketch. She denied the suggestion that the distance between parapet of the balcony and the roof of the balcony is less than a metre. She also states that she does not remember to whom the dining table which is shown in the said hall belongs. She admitted with reference to photograph Exhibit D-1 that there were two rice plates seen kept on the table. She however states that she does not know whose they were. So also in respect of the pair of shoes, she does not know to whom they belong. She further states that when Raoji first put off the light, she was standing near the door of the room and her sister-in-law, Kunda was also in the hall. Her mother, Pw.18, was in the kitchen and her brother, Pw.2, Ashok was sitting in the verandah. She further states that at the time Satish, respondent No.1 went to get the knife, he was in the hall, which is identified in the sketch as 'C'. She also states that when respondent No.1, Satish inflicted stab blows on the deceased, he inflicted them by bringing his hands down, i.e. the blade of the knife was brought downwards on the back of the deceased, Raoji. She also states that respondent No.1, Satish inflicted several knife blows, at least two to four times. She also states that when the deceased was being stabbed, she was in front of him and very close to him. She admits

that after Satish received back the knife from his mother, the same remained with Satish till the end. She denied the suggestion that when Narayan came to reside in the house, gambling was going on in the house every night and that Rauji, Ashok and some other villagers were taking part in the gambling. She denied the suggestion that it was because of this that the relations between Narayan and Raoji were strained. She admits that Satish, respondent No.1 was not in the house 8 days prior to the incident and he returned on the very day of the incident at about 5.30 p.m. She admits that Satish had gone to Delhi some days prior to the incident, but could not say whether he had gone on 2nd April, 1988. She denied the suggestion as false that respondent no.1 got up only at 8.30 p.m. She also denied the suggestion that two plates which were seen in the photograph D-1, one was meant for respondent No.1, Satish and the other for respondent No.2, Mohan. She asserted "No kind of assault at all took place in the hall, till the last. The only reason we left the hall and went to the balcony was to avoid the assault by the accused." She admits that Yeshoda did not attempt to assault Raoji with knife, but she went to assault Kunda with it. She further asserted "I say that Satish, A-1, used the said knife to stab Raoji while he was fallen after A-3 handed back the knife to him after assaulting Kunda." She also stated that respondent No.2 assaulted deceased with lamp after the deceased had already fallen on the ground. She was asked the

following questions :

> "Q: Did A-2 assault others also with said lamp ? A: He might have assaulted Kunda and my mother Laxmi with the same, but I do not clearly recollect about it. Q: It is your case that while Satish was having a knife in his hands and Mohan a lamp (lamondivo) they assaulted Kunda and Laxmi only with slaps and fist blows ? Y: Yes."

14. In the cross examination, she admitted that it is possible that while one of witnesses was being assaulted by the accused the other accused were assaulting other witnesses. She also admitted that after assault on Raoji, when he collapsed at no point of time, they took him inside the hall but he was taken directly from the veranda to the land infront of the house.

15. The following omissions and contradictions have been elicited in the cross examination :

(a) She admits not to have stated to the police that "at about 19.45 hrs. my brother had put one tube of electricity off from the entrance room". She was confronted with this portion of the statement which was marked as Exhibit D-2;

(b) She admits to have stated to the police in her

complaint that at about 20.30 hours, her sister-in-law, Smt. Yewshoda/accused No.3 started giving her filthy words. She also admits to have stated to the police in her statement that the accused as well as they all came to the verandah as the lights were put off from the hall;

(c) She admits to have stated to the police in her complaint that while accused no.3 was abusing her, A-1 came with a knife in his hand from his mother's room and gave a stab on the back of her brother, Raoji;

(d) She states that she has stated to the police in her complaint that "accused No.2 came armed with a brass chain of brass deuli and assaulted my brother Rauji";

(e) She has stated to the police in the complaint that accused No.3 had pressed the testicles. The witness was confronted with the complaint where it was found that it is not so recorded.

(f) She admits to have told the police in her complaint that "We shifted Raoji from verandah to the land in front of the house". When confronted with the complaint, it was noticed that it is not so recorded.

(g) She states that they informed the police in her complaint that the accused assaulted Raoji in front of

the house. She was confronted with the complaint where it is found not to be so recorded;

(h) She states that he had informed the police in her complaint that accused No.1 threatened the people who had gathered that in case they interfered, he would murder two more persons. When confronted with the complaint, it was noticed that this is not stated by her.

16. She admits that she could not say as to how the rice which is seen fallen on the ground in the photograph no.1, had fallen there. An omission was also brought out in respect of what was stated by Narayan 8 days prior to the incident that he would be leaving on 19th for Ghataphrabha and the accused should do what they like. Similarly, the omission was brought out in the cross examination that Pw.1, had gone to verandah from hall because the accused attempted to assault and to avoid the assault, they had gone to the verandah. Similarly, an omission was brought out in the cross examination that respondent No.1 had told the persons who had gathered there that they had already murdered one person and in case any one interfered, they would finish two more persons. An omission regarding shifting Raoji from verandah to the open space in front of the house was also brought out in the cross examination. An omission that the deceased and other members of her family were assaulted in the courtyard was also brought out. The

omission in respect of bringing of the kerosene lamp in the hall after tube light was switched off, was also brought out in the cross examination. The defence of the accused was put to her and was denied by her.

17. In respect of Pw.1, learned trial Court in para 9 of his Judgment has observed thus:

> "This witness was cross examined by the accused. The testimony of this witness was completely shaken at the time of the cross examination. There are material contradictions in the evidence of this witness (Pw.1). Moreover her evidence is also not consistent with the evidence of other material witnesses including medical evidence."

At para 10, the learned trial Court, in respect of Pw.1, has observed :

> "... It is thus seen that there are several contradictions and omissions amounting to contradictions in the evidence of Pw.1 Baby Sawant which contradictions in my opinion are material contradictions rendering the evidence of Pw.1 Baby unreliable."

Thus, according to the learned trial Court, no reliance could be placed on the evidence of Pw.1, Baby.

18. Pw.8, Kunda, widow of the deceased, Raoji, states that on 19.4.1988, she and her mother-in-law,

Pw.18, Laxmi had gone to Kumbharjua to attend 12th day ceremony of her father and returned to their home at about 6.30 p.m. on the same day. She states that at that time her husband had also returned. She states that the deceased Raoji went to the market and brought some cereals and coconut and thereafter, the deceased went to take bath and after taking bath, came in the hall. According to her, the deceased was wearing an underwear and had wrapped a towel around his waist. The deceased switched off the light, which was burning in the hall. It was about 7 p.m. Respondent No.1 who was inside the house at that time, came and switched on the light which was once again switched off by the deceased. Thereafter, respondent No.1 removed the fuse from the main switch and lighted kerosene lamp and kept it in the hall. After that there was a quarrel between accused and the deceased. Accused started abusing the deceased and respondent No.3 caught the deceased by his hair and threw him down on the ground. She also states that apprehending danger to the deceased, Pw.1 advised him to run away from the house. Respondent No.1, thereafter, went to his room and brought a knife and gave two blows on the back of the deceased. After respondent No.1 dealt knife blows, he handed over the knife to respondent No.3, Yeshoda and respondent No.3 Yeshoda was attempting to assault the deceased, Pw.8, Kunda caught blade of the knife in her hand and in the process sustained an injury on the finger to her right hand. According to her, respondent No.3, Yeshoda kicked

the deceased when he had fallen on the ground. Respondent No.2, Mohan removed the brass lamp, which was hanging in the balcony and assaulted the deceased on his head with the said lamp. Her brother-in-law, Ashok, Pw.2 returned in the house after sometime and asked the accused as to what they were doing and why they were assaulting the deceased. Thereupon, respondents No.1 and 2 pushed Pw.2, Ashok on the sofa. Yeshoda, respondent No.3, was telling respondents No.1 and 2 to leave Pw.2, Ashok and finish off the deceased. According to Pw.8, Kunda, the deceased was assaulted by respondent No.1 with knife in the verandah in the house and he sustained bleeding injuries on the leg and was unconscious. The deceased was lifted and taken in the courtyard. The sister of respondent No.1 brought a pipe from the house and gave it to respondent No.1 who assaulted the deceased on his right hand, when the deceased was lying on the ground. Respondent No.1 also assaulted Pw.1 on one of her legs. Juvenile offender, Sharmila brought a cement block, shaped like an elephant trunk. But Pw.1, snatched it out of her hand. Respondent No.1 had threatened the crowd who had gathered there that in case they interfered, they would be killed. According to her, respondent No.1 also told the people that he wanted to commit two murders and because of fear, no one intervened to rescue. On arrival of the police jeep, the accused ran inside the house. The deceased was taken in the police jeep to the Goa Medical College. She also states that Pw.18, Laxmi was also assaulted by the

accused. They were treated in the hospital for the injuries suffered by them.

19. In the cross examination, a contradiction is brought out in respect of marriage of Pw.8, Kunda with the deceased which took place in the year 1987. According to her their marriage had solemnized in 1986. She denied the suggestion that she was not married to the deceased. She admits that their relations with the respondents were strained on account of the water and electricity bills. She admits that she does not know who had switched on the light in the hall as she was sitting in her room. She admits that she does not know exactly where Pw.1, Baby and her mother-in-law, Pw.18, Laxmi were when, she was sitting in the room. She admits that she was inside when switching off and switching on of the lights went on between the deceased and respondent No.1. She, however, admits that she was inside the hall when respondent No.1, Satish removed fuse from the main switch. She admitted that immediately after the light was switched on, the quarrel started between the deceased and the respondent No.1. The quarrel continued upto 8.45 p.m. and that was the time, the police arrived at the site. According to her, the quarrel started at 6.45 p.m. She admits that her statement was recorded on 23rd April, i.e. 4 days after the incident. She was confronted with the portion in the statement that the quarrel started at 8.30 p.m. She further states in the cross examination that after the

deceased was thrown on the ground by respondent No.3 in the hall, the deceased got up and walked out into the balcony and the deceased was in the balcony when respondent no.1 inflicted knife blow on him. She states that she had seen two knife blows being inflicted on the deceased. She also states that the blow with the lamp was given when the deceased had fallen on the ground. Respondent No.2 had given the blows with the brass lamp while holding chain in his hand. She also admits that she cannot say to whom the two rice plates belonged. She admits that the family of the accused used to eat on the dining table. She admits that she does not know to whom the pair of shoes seen on the dining table, belonged. She admits that she cannot say how the rice which had fallen on the kitchen floor, had so fallen. She further denied the suggestion that the deceased came in the hall after taking his bath and had not wrapped any towel around his waist. An omission was brought out regarding wrapping of the towel by the deceased. She was confronted with the portion marked as "C-C" from her statement that the deceased came in the entrance room and sat on the chair and switched off the tube light and went to the room where they were sleeping. She denied the suggestion that no kerosene lamp was kept lighted on the dining table. In respect of the rice which was seen spilled on the floor, Pw.8, Kunda states that the rice was thrown there on the floor of the kitchen by the accused subsequently after the incident. She also denied that the house had previously

been used as gambling damn and that Parmesh Naik and Pw. 4, Eknath Naik were the members of "Rauji's Gambling Group".

20. Pw.8, Kunda admits that kerosene lamp was brought from the kitchen to the dining table by respondent No.3, Yeshoda after the lights were put off. She has stated "It is not true to say that there was no other kind of light in the house after the electricity were put off. I say that there was a light of kerosene lamp." An omission was brought out in respect of the strained relations of the deceased and the accused on account of the dispute over the electricity bills.

21. In respect of the evidence of Pw.8, learned trial Court, in para 14 of the Judgment has observed thus:

> "It is thus seen that the evidence of Pw.8 Kunda is neither here nor there. Moreover there are also material contradictions in the evidence of this witness also and as such it is difficult to place reliance on the testimony of this witness also".

22. Pw.18, Laxmi, mother of the deceased, Raoji and grant-mother of respondents No.1 and 2 and mother-in-law of respondent No.3, states that about 8 to 9 years back, Raoji had taken bath and sat on the sofa. She states that prior to that he had put off the light from

"chowk". Thereafter, respondent No.1, Satish put on the light in the "chowk". Deceased Raoji told him not to put on the light as he was paying electricity bills. There were altercations and fights between them. She has clarified that by fights, she meant that the respondent hit "Lamandio" (brass lamp) on Raoji on his head and respondent No.1 gave a knife blow on the back of Raoji. Raoji fell on the ground and Pw.18, prostrated herself on Raoji, telling accused not to assault Raoji. She further states that accused No.3, caught hold of her and started shaking and abused her. She states that thereafter, accused Nos.1 and 2 gave slaps to Pw.2, Ashok and accused No.3, told accused Nos.1 and 2 not to assault Ashok as one day he would die. She states that all the accused thereafter assaulted Pw.8, Kunda and Pw.1, Baby. She states that respondent No.3, also gave kick to her. She states that she does not remember as to who actually assaulted her as since the death of Raoji, she is not in proper senses. She states that in the courtyard, respondent Nos.1 and 2 again assaulted Raoji with a pipe and a piece of cement block shaped like a trunk of an elephant.

23. In cross examination, she clarifies to say that "chowk" is the hall of the house. She admits that Narayan and his family members used to take their food on their table. She states that Raoji was wearing an underwear and a towel. She denied the suggestion that

Raoji was wearing only underwear. She was confronted with her statement in the police statement that at about 20.15 hours, Raoji came in the house after taking bath wearing his underwear and sat on his chair and switched off the lights. She admits that the deceased had switched off the lights after respondent No.1, Satish had switched on the lights. She states that she does not remember whether she had stated to the police that respondent No.3, Yeshoda went in the kitchen room and lighted kerosene chimney and was putting rice in the plate. She was confronted with the portion in her police statement wherein she stated that accused No.3, Yeshoda took a cement block shaped like trunk of an elephant and was trying to hit the same on Raoji, but Pw.1, Baby took it away. She was also confronted with the statement in the police statement that Raoji returned home from work at 6 p.m. She states that she does not remember if she had stated to the police that thereafter, Raoji left for Banastari Bazar and brought two coconuts and left for taking bath. Contradictions were brought out in cross examination in respect of respondents No.1 and 2 giving slaps to Ashok and all the accused assaulting Pw.1, Baby. According to the police statement, the portion which is proved in the cross examination, is that the accused No.1 assaulted Ashok, Pw.2 and Baby, Pw.1. The omission was also brought out regarding the assault on the deceased by the cement block, shaped like elephant trunk. She stoutly denied the suggestion that respondent No.1 did not stab Raoji with the knife.

24. In respect of the evidence of this witness, the learned trial Court in para 16 of the Judgement has observed thus :

> "The testimony of this witness therefore, cannot be believed. In any event in case the evidence of Pw.4 is believed, in that case the evidence of Pw.1 Baby, Pw.2, Ashok, Pw.8 Kunda and Pw.18 Laxmi shall have to be discarded as there is no consistency in the evidence of Pw.4 vis-a-vis the evidence of other witnesses."

25. Pw.2, Ashok, brother of the deceased and uncle of respondents No.1 and 2, states that on the day of the incident at about 8 to 8.30 p.m, he was sitting on the 'sopo' of their house. The deceased Raoji had gone for taking his bath and had switched off the light after taking his bath. He further states that accused No.1, Satish, inquired with Raoji the reason why he had switched off the tube light and thereafter, Satish respondent No.1, switched on the tube light. There was a verbal discussion between respondent No.1, Satish and the deceased Raoji and respondent No.1 started abusing Raoji. He further states that "Then there was maramari between accused and the Raoji". He further states that Raoji's wife, his sister, Baby and mother brought Raoji in the Padvi of the house. According to him, respondent No.1, Satish, respondent No.2, Mohan and respondent No.3, Yeshoda pushed his

mother, Pw.18, Laxmi. He further states that accused No.1, Satish told his mother, accused No.3, Yeshoda to bring the knife. Thereafter, according to this witness, accused No.1, Satish, went inside the house and brought a knife and hit Raoji on his back. He also states that accused No.2, Mohan brought the brass lamp and hit the lamp on the head of Raoji. He states that Raoji was then removed from the Padvi and brought into the compound. He further states that he was assaulted by accused No.1, Satish and accused No.2, Mohan with slaps when he went to the rescue of Raoji. He further states that accused No.1, Satish and accused No.2, Mohan told the people who had gathered that they would assault them and, therefore, the people went away. He further states that the cement block, shaped like a trunk of an elephant, was used by accused No.3, to assault the deceased. The same was snatched by Pw.1, Baby. He also states that the juvenile offenders assaulted Pw.1, Baby, his mother and wife of Raoji. He candidly admits that he could not make out how Pw.1 Baby and Pw.8, Kunda were assaulted, as it was dark and he was at a distance, though there was light from the electric lamp on the pole, on the road. He also states that there was lights of the shops and lights of the vehicles passing on the road. In the meantime, he states the police jeep arrived and the deceased was taken to the hospital.

26. In the cross examination, he admits that he

does not know to whom the dining table belongs. Similarly, he also states that he does not know to whom the items on the said table belonged. He states that he came to the house at about 7 to 7.30 p.m. and Raoji came after about 15 minutes. He admits that the deceased, Raoji was married a year before his death. He also admits that on the day of the incident, Raoji returned home at about 6 to 6.30 p.m. and thereafter, went to make some purchases. He also admits in the cross examination that there was mutual scuffle between accused No.1 and the deceased in the hall and in that process, both of them pushed each other and advanced themselves into the verandah. He further admits that in the verandah also there was mutual scuffle between them and the fight continued. He states that accused No.1 gave a fist blow to the deceased, as a result, the deceased fell down. He further states that while the deceased was falling down, accused No.1 gave a knife blow to the deceased. The deceased was in a bending position when accused No.1 gave the knife blow. He further states that accused No.1 gave two knife blows on the back of the deceased. and at that time he was standing to their side. An omission was brought out in the statement before the Juvenile Court that accused No.1 had hit Raoji with the base of the brass lamp. Similar contradiction was pointed out from his deposition before the Juvenile Court that during the mutual scuffle, the deceased had fallen on the ground. He admitted that as the switch was removed, it was dark in

the hall and in the verandah. However, illumination was extending upto the verandah, besides there were lights of the passing vehicle on the road and the shops. It was also confronted with the statement made before the Juvenile Court that accused No.2 was sitting along with him on the sofa. An omission was also brought out in his police statement that accused No.1 was in the room while accused No.1 was sitting in the verandah when the deceased came after taking his bath. He also denied the suggestion that Raoji was not married to Pw.8, Kunda. He asserted that accused No.3 had lit the kerosene lamp after the tube light was switched off.

27. In respect of this witness, the learned trial Court at para 13 of the Judgment has observed, thus :

> " ...Apart from the above contradictions there are several more contradictions which have appeared in the evidence of this witness. I am therefore, satisfied that Pw.2, Ashok also has not come out with the whole truth."

28. Pw.4, Eknath Naik, states that on hearing the noise of quarrel, he stood near 'Vinayak Bar" and saw the incident. He states that besides noise of the quarrel, he also noticed noise of utensils being banged. He states that many people, including himself stood underneath the street light to the electric pole in front of the house of the deceased and in that illumination, they saw the

incident. He states that he had seen the incident of assault on the deceased. He had also seen the wife of the deceased as well as sister of the deceased dragging the deceased from inside the house to the courtyard. He does not know who assaulted Pw.8, Kunda and Pw.1, Baby. He says that the deceased was sent to the hospital in a jeep.

29. In the cross examination he admits that he was working as waiter in a hotel. He states that the deceased Raoji was a short-tampered person. He admits that the electric pole is at a distance of about 8 to 10 metres from the house of the deceased. He denied the suggestion that the street light on the road does not illuminate the house of the deceased. He further says that the deceased, Raoji snatched the lamp from the hands of accused No.1 in order to assault accused No.1. He states that thereafter accused No.1 took up the oil lamp and assaulted the deceased. He further states that accused No.1 stabbed the deceased with knife near the 'Tulas' which is at a distance of 3 metres from the verandah. He further states that after the deceased was dragged out of the verandah, accused No.1 stabbed him with knife on his back.

30. In respect of the testimony of Pw.7, Dr. Purnanand Audi, the trial Court has held that Pw.1, Baby has stated in her cross examination that accused No.1 inflicted stab blows on the deceased, Raoji by bringing it downward; whereas, according to the post-mortem report and

also as per the the statement of Dr. Audi, the direction of the injury was upward, on the basis of which, the learned trial Court in para 20 of his Judgment, has held :

> " I therefore find that the medical evidence do not support the ocular evidence of the prosecution witnesses."

The learned trial Court has also held that looking to the fact that the prosecution witnesses had disclaimed any knowledge about the rice in the rice plates, the trial Court has held that the witnesses have denied their knowledge to make it appear that the incident had not taken place at 8.30 p.m. and looking into the inconsistency in the defence taken by the accused, the trial Court felt that the defence theory is quite probable.

31. Discrepancy in the evidence of eye witnesses, is bound to be there. No two persons who have witnessed an incident would be able to depose regarding the sequence of events with any degree of mathematical accuracy. Perception of the incident, capacity to retain the incident and capacity to depose about what was witnessed, differ from person to person. It is extremely hazardous to insist that the testimonies of two or more eye witnesses should be exactly identical. Inter se discrepancies in the testimonies of the eye witnesses would not render the testimonies as improbable or would not affect the credit-worthiness of the eye witnesses. The inter se discrepancies, minor contradictions and omissions are bound

to occur in the testimonies of witnesses who are deposing about the incident long after it had happened. Pw.1, Baby was examined on 29.10.1988 and she was discharged on 21.7.1990; Pw.2, Ashok was examined on 20.8.1991 and was discharged on 6.8.1994; Pw.4, was examined on 27/10/1997. Pw.8, Kunda was examined on 22.11.1995 and was discharged on 8.1.96. Pw.18, Laxmi was examined on 20.121997 and was discharged on 21.1.1998. The trial which had begun in the year 1988, concluded with the examination of Pw.21 on 7.7.1998. Thus, some of the witnesses were deposing about the incident nearly 8 years after it had happened. Undeniably, passage of time erodes human memory and affects the ability to recapitulate the events and depose about the same. Presence of minor contradictions and omissions should not alone be made the touchstone for judging the veracity of witnesses. If the contractions and omissions do not affect the substratum of the prosecution case, the evidence of the witnesses cannot be discarded on the ground of unreliability. If the witnesses are natural witnesses to the incident, the Court has to appreciate the evidence of the witnesses taking into consideration the fact that no two witnesses would be able to depose identically and also that the evidence does not become dubious if there are minor contradictions inter se in the evidence of the witnesses. Contradictions and omissions in the evidence of witnesses cannot be used as magic incantation or 'mantras' by the Courts to discard an otherwise reliable evidence, particularly of those witnesses who are natural witnesses

and whose presence at the scene of offence is admitted by the accused. In the present case, the accused in their defence, have admitted the presence of Pw.1, Baby, Pw.8, Kunda, Pw.18, Laxmi and Pw.2, Ashok.

32. In a case where the prosecution examines a large number of witnesses, the Court should not jettison the prosecution case because of inter se contradictions in the evidence of eye witnesses. An attempt should always be made by the Court to separate grain from the chaff, truth from the falsehood and only in the event that such an exercise is impossible and where the truth and falsehood is so entangled or enmeshed that they cannot be separated, the Court would be justified in jettisoning the entire prosecution case. The evidence of Pw.1, Baby, Pw.8, Kunda, Pw.2, Ashok and Pw.18, Laxmi is to a large extent consistent excepting certain discrepancies on minor aspects of the case. However, the contradictions and the omissions so proved in the course of examination, according to us, do not justify whole-sale rejection of their evidence. It is true that Pw.4, digresses on certain aspects especially regarding the place where the deceased was stabbed and about the deceased snatching brass lamp and attempting to hit accused No.1. If the evidence of Pw.4 Eknath is appreciated as against the evidence of other eye witnesses, according to us, the learned trial Court failed in performing the exercise of separating the grain from the chaff and ought to have disbelieved the evidence of Pw.4

instead of jettisoning the entire prosecution case.

33. In the present case, the defence of the accused is because of the darkness inadvertently, one of the eye witnesses must have stabbed the deceased, mistaking him to be accused No.1. Therefore, the question before the Court is whether the respondents/accused have been able to establish their defence by preponderance of probabilities. All the eye witnesses, excepting Pw.4 were inside the house, and have described the incident in detail. No doubt because of switching off the light, there was darkness. However, the witnesses have stated that there was illumination from the street light, also from the lights of the shops and the vehicles passing on the road. Moreover, the witnesses have stated that the accused went inside the room and brought out a knife with which he had stabbed the deceased. The eye witnesses stoutly denied the suggestion that in the darkness, they had inadvertently stabbed the deceased. A quarrel was going on between the deceased and the accused and the inmates of the house, who knew the deceased and the accused intimately and even if it was dark, would not mistake one for the other. Moreover, they did not harbour animus against accused No.1 atleast not to such a degree as to get a knife to stab accused No.1. The deceased had suffered 16 injuries, out of which three were stab wounds, due to knife article 8. During the recording of the scene of offence panchanama, the knife was not found in the house. The knife came to be seized at the instance

of one of the accused. It is true that juvenile offender on whose disclosure statement, the knife was recovered was acquitted. But the fact remains that the knife was not seized at the scene of offence. Moreover, the eye witnesses have affirmatively stated that they had seen the respondent No.1 stabbing the deceased and uniformly repelled the suggestion that because of darkness they could not see who had stabbed the deceased. If the assertion of eye witnesses in this regard remains unaffected, we would be entering into the area of conjunctures and surmises, if we hold that because of darkness the eye witnesses could not have seen the incident. It is no doubt true that the accused is required to establish his defence by preponderance of probabilities. By preponderance of probabilities, would mean that the accused needs only to establish that his defence "may be true". According to us, therefore, it is difficult to hold that the accused have been able to probablise their defence.

34. One Dr. Pednekar, Senior Resident, attached to the Casualty Department, had examined Pw.8, Kunda, Pw.28, Laxmi and Pw.2, Ashok. During the trial, however, Dr. Pednekar was not available to depose before the Court and, therefore, the Hurt Certificates of Pw.8, Pw.18, and Pw.2 were proved through Pw.17, Mrs. Nalini Madkaikar, who was working as Medical Record Keeper. She has only identified the signatures of Dr. Pednekar on the Hurt Certificates of the above referred witnesses. The hurt

certificates are marked as Pw.17/B-colly. The Hurt Certificates of Pw.8, Pw.18, and Pw.2, have not been proved by satisfactory evidence and, therefore, they cannot be taken into consideration. The respondents are charged for the offences punishable under Sections 143, 147 and 149, read with Section 323 in respect of the hurt caused to Pw.8, Kunda, Pw.18, Laxmi, Pw.2, Ashok and Pw.1, Baby. In respect of Pw.1, Baby, it does not appear that she was sent for medical examination. The acquittal of the respondents on the above count, deserves to be maintained.

35. Mr. Lotlikar, the learned Senior Counsel appearing on behalf of the respondents submits that in view of the contradictions and omissions in the testimonies of eye witesses and particularly in view of the fact that the witnesses have changed the scene of offence from the hall to the verandah, the witnesses deserve to be disbelieved. Exhibit Pw.3/A is the panchanama of the scene of offence. In the scene of offence panchanama, exhibit Pw.3/A there is a reference to 'patch of blood' on the wall as well as floor of the verandah. I.O. Pw.21, J. Dias has stated that there were no blood stains in the hall as suggested. The witnesses have consistently maintained that the stabbing incident did not take place in the hall, but took place in the verandah. The presence of blood stains in the verandah, fully corroborates the version of the eye witnesses. Therefore, in our considered opinion, the evidence of the eye witnesses cannot be disbelieved on the

count that they have changed the scene of offence from the hall to the verandah.

36. It was next urged by Mr. Lotlikar, the learned Counsel for the defence that the medical evidence is in conflict with the ocular testimony of the eye witnesses. According to the learned Counsel, the evidence of Pw.7, suggests that the direction of the fatal injury No.1 was downwards; whereas the evidence of Pw.1, Baby suggests that the direction of the injury was upwards. A small discrepancy of an witness in stating the manner in which the weapon was wielded to cause the injury, cannot be used as a lever to discard the entire prosecution case which, otherwise, appears to be cogent and reliable. According to us, this discrepancy is hardly of any significance and it cannot be said that the medical evidence is in conflict with the ocular testimony of the eye witnesses.

37. Mr.V.P. Thali, the learned Addl. Advocate General appearing for the appellant/State has invited our attention to the case of Solanki Chimanbhai Ukabhai v. State of Gujarat (A.I.R. 1983 S.C. 484). The Supreme Court at para has held thus :

> " The appellate Court while dealing with an appeal against the order of acquittal has full power to review at large the evidence on which the order of acquittal is founded and to reach

> a conclusion that upon such evidence the order of acquittal should be reversed. However, in exercising that power the appellate Court should give proper weight and consideration to the following matters : (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of the appellate Court in disturbing a finding of fact arrived at by a Judge, who had the advantage of seeing the witnesses, which finding would not certainly be disturbed if two reasonable conclusions can be reached on the basis of the evidence on record.

Mr. S .D. Lotlikar, the Senior Counsel appearing for the respondents, has invited our attention to Ramesh Babulal Doshi v. State of Gujarat ((1996) 9 Court at para 7, wherein the Apex Court has held as under:

> "In the instant case the entire approach of the High Court in dealing with the appeal was patently wrong for it did not at all address itself to the question as to whether the reasons which weighed with the trial court for

recording the order of acquittal were proper or not. Instead thereof the High Court made an independent reappraisal of the entire evidence to arrive at the conclusions. The metre fact that a view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate Court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then – and then only – reapprise the evidence to arrive at its own conclusions."

38. With the assistance of the learned Counsel appearing for the parties, we have perused the evidence and the findings given by the learned trial Court and after appreciating the evidence, we have arrived at a finding that the reasoning given by the learned trial Court for rejecting the testimony of eye witnesses, is perverse and unsustainable. We also hold that the defence taken by the accused is not probablised.

39. We are conscious of the fact that this is an appeal against acquittal and though the appellate Court has undoubted power to reappreciate the evidence, the appellate Court should be slow in disturbing the order of acquittal if the view taken by the trial Court is a possible view. Since we have come to the conclusion that the reasoning of the learned trial Court in acquitting the accused is perverse and unsustainable, the appeal is being entertained.

40. We may at this stage point out that a fanatical adherence to the practice of rejecting the evidence of eye witnesses on the ground of contradictions and omissions, without examining the intrinsic worth of their testimonies is, according to us, not a correct approach of appreciation of the evidence. A Judge should evaluate the effect of contradictions and omissions in the evidence of the eye witnesses inter se, and if the effect of the contradictions and omissions is of such vital importance that it renders the testimony of eye witnesses doubtful, the Court would only

then be justified in refusing to rely upon their testimony. Minor contradictions, omissions and inter se contradictions relating to the manner of the assault which, by themselves, do not rob the testimony of its intrinsic worth, should not be used to discard the otherwise reliable evidence. Delay in recording the evidence, individual perception, fallible memory and inability to marshal the sequence of events are some of the factors which are responsible for the contradictions and omissions creeping into the evidence of the witnesses.

41. This takes us to the question of the offence committed by the respondents No.1 and 2. We unhesitatingly accept the evidence of eye witnesses, namely Pw.2, Ashok, Pw.8, Kunda, Pw.18, Laxmi and Pw.1 Baby. We have great reservations about accepting the evidence of Pw.4, Eknath and we find that judging his evidence with the evidence of other eye witnesses, pw.4 Eknath is not a reliable witness. All the eye witnesses referred to above, have categorically stated that respondent No.1/Accused No.1, dealt the knife blows on the back of the deceased. The medical evidence corroborates the existence of injuries by means of a knife on the person of the deceased. The deceased died because of injury No.1 which proved to be a fatal injury. It is true that the two juvenile offenders Sarita and Sharmila have been acquitted by the Juvenile Court and the offences, therefore, under Sections 143, 147, and 149 of the Indian Penal Code

cannot be said to have been proved against the respondents. Though there is no charge simpliciter under Section 302 or Section 323 against the respondents No.1,2 and 3, the Court can examine if offence under Section 302 or 323 is proved against the respondents.

42. It was urged by learned Counsel appearing for the respondents that in case this Court finds that the respondent No.1 has committed an offence, the offence at the most would fall under Section 304, Second Part. According to him, the respondent No.1 is alleged to have dealt only one knife blow. The knife blow had been inflicted by respondent No.1 on provocation of the deceased and it was in a sudden fight. This is not a case of single blow being given by means of a knife. Injury No.1 is a knife injury which proved to be fatal. Apart from this, there are two other stab injuries by means of knife. Respondent No.1 is alleged to have, during the course of the altercations, gone to the room and brought a knife. The intention of a particular accused to commit crime can be gathered from the nature of the weapon that is used, gravity or the nature of the injury that is caused, the place where the blow was intended to be inflicted and the exhortations, if any, accompanying the infliction of the injuries. According to Pw.7, Injury No.1 was a stab wound of 4 x 1 cm. and depth of 12 cms. It had penetrated the chest wall through the right inter costal space, penetrating the lower lobe of the right lung through the diaphragm and had entered the abdominal cavity, causing cut

to the liver. The blow was delivered with sufficient force which has penetrated the depth of 12 cms. The knife with which the injury was caused, had a blade of 7 inches with attached handle of 4 inches. After inflicting this injury two other incised wounds, namely injury Nos. 2 and 3 had been caused though the said injuries were superficial. The Doctor has opined that the knife article 8 would have caused injuries 1, 2 and 3.

43. Respondent No.1/accused No.1 cannot be said to have caused injuries under the grave and sudden provocation. Respondent No.1 had gone inside the room during altercations and had fetched the knife and had caused injuries. The deceased by switching off the light, had not caused any provocation. In any event, it was not a grave and sudden provocation. So, therefore, according to us, the offence in respect of respondent No.1/accused No.1 would, clearly, be punishable under Section 302 of the Indian Penal Code. In respect of respondents No.2 and 3, it is alleged that respondent No.2 hit the deceased by means of brass lamp on the head of the deceased and respondent No.3 is alleged to have kicked the deceased. Respondents No.2 and 3 would, therefore, be guilty of an offence punishable under Section 323 read with 34 of the Indian Penal Code.

44. In view of our aforesaid finding of guilt of the respondents/accused, it will be necessary to hear them on the question of sentence to be imposed on them. We,

therefore, give opportunity to the respondents/accused to submit on the point of sentence.

V.C. DAGA, J

P.V. HARDAS, J.

ssm.

DATE : JULY 2, 2002.

JUDGMENT CONTINUED : (Per HARDAS, J.)

45. The Judgment convicting respondents No.1,2 and 3 was pronounced in the Court yesterday and an opportunity was given to the respondents/accused to make submissions in respect of the sentence. Respondent No.1 is present in person. Mr. S.D. Lotlikar, the learned Senior Counsel appearing for respondent No.1 states that leniency may be shown as this is not a 'rarest of rare cases' which would call for extreme penalty of death. Looking to the totality of the circumstances and the manner in which the offence was committed, this is not a 'rarest of rare cases', calling for extreme sentence of death. In view of this, therefore, respondent No.1/original accused No.1 stands convicted for the offence punishable under Section 302 of the Indian Penal Code and is sentenced to undergo Imprisonment for Life and to

pay a fine of Rs.5,000/-, in default, to undergo Simple Imprisonment for three months.

46. In respect of respondents No.2 and 3/original accused Nos.2 and 3, it is urged by Mr. Lotlikar, the learned Senior Counsel appearing for the respondents, that respondent No.2/original accused No.2 has undergone imprisonment for a period of one year and respondent No.3/original accused No.3 has undergone imprisonment for a period of 8 days, as pre-trial detention. He, therefore, urges that since the respondents No.2 and 3 have been found guilty of the offence punishable under Section 323, read with 34 of the Indian Penal Code, they may be let off on the period of imprisonment already undergone by them.

47. We have given our anxious consideration to submissions of the learned Counsel for the respondents and we feel that the ends of justice would be met if respondents No.2 and 3/orginal accused No.2 and 3 are sentenced to suffer the imprisonment already undergone by them. We, therefore, hold that respondents No.2 and 3/original accused No.2 and 3 guilty of the offence punishable under Section 323, read with 34 of the Indian Penal Code and sentence them to imprisonment already undergone by them and respondents No.2 and 3 shall pay a fine of Rs.1,000/-each, in default, to undergo one month S.I.

48. In the result, the appeal is allowed.

Respondents No.1, 2 and 3/original accused Nos.1,2 and 3 stand convicted and sentenced as aforesaid. Their bail bonds shall stand cancelled. Six weeks time is given to respondent No.1 to surrender. Certified copy expedited.

V.C. DAGA, J.

P.V. HARDAS, J.

ssm.